

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1975

No.

76-104

COMMUNITY SCHOOL BOARD OF
BROOKLYN, NEW YORK DISTRICT
NO. 14 and WILLIAM A. ROGERS, L. E. D.
in his official capacity as
Community Superintendent, ^{the Court, U. S.} ¹⁹⁷⁶
District No. 14,

MICHAEL RODAK, JR., CLERK
Petitioners.

against

CLAUDE L. HUNTERY, JR.,

Respondent.

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS (continued on following page)

	PAGE
Opinions Below	2
Jurisdictional Statement	2
Question Presented	2
Statement of the Case	5
Conclusion	20

Appendix:

Order recalling mandate pending petition for certiorari	A 1
Opinion of the Court of Appeals	A 2
Opinion of District Court	A17

TABLE OF CASE

<u>Adams v. Walker</u> , 492 F. 2d 1003 (7th Cir., 1974)	17
<u>Bishop v. Wood</u> , ____ U.S. ____, 44 U.S.L.W. 4820, June 8, 1976,.....	14, 15, 19
<u>Board of Regents v. Roth</u> , 408 U.S. 564 (1972).....	11, 12, 14, 16, 17, 19,

TABLE OF CONTENTS
(continued from previous page)

	Page
<u>Brouillette v. Board of Directors, of Merged Area IX, Etc.</u> , 519 F. 2d 126 (8th Cir., 1975).....	18
<u>Buhr v. Buffalo Public School District No. 38</u> , 509 F. 2d 1196 (8th Cir., 1974).....	18
<u>Paul v. Davis</u> , ____ U.S. ____, 47 L. Ed. 2nd 405 (1976).....	14
<u>Scheelhaase v. Woodbury Central Community School Dist.</u> , 488 F. 2d 237 (8th Cir., 1973), cert. den. 417 U.S. 967 (1974).....	18
<u>Shirck v. Thomas</u> , 447 F. 2d 1025 (7th Cir., 1971), vacated 408 U.S. 940 (1973), on remand 486 F. 2d 691 (7th Cir., 1973).....	18

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This is a petition for certiorari to
the United States Court of Appeals for the
Second Circuit for review of a judgment
entered on May 12, 1976, which reversed an
order and judgment of the United States

District Court for the Eastern District
of New York. The District Court, after a
trial, had dismissed the complaint and
granted judgment to the defendants (here
the petitioners). The mandate of the Cir-
cuit Court has been stayed pending the
filing of this petition for certiorari.
A copy of the order staying the mandate
has been appended hereto.

Opinions Below

The opinions of the Court of Appeals
and the District Court have not yet been
reported. Both are appended hereto.

Jurisdictional Statement

The judgment of the Court of Appeals
was entered on May 12, 1976. This Court's
jurisdiction is invoked under 28 U.S.C.
§1254(1).

Question Presented

In this proceeding brought pursuant

to 42 U.S.C. §1983, the plaintiff, a former acting principal of an intermediate school in the New York City public school system, whose employment had been terminated without his having been afforded a hearing as to the reasons for his termination, sought reinstatement and damages.

Prior to his termination the plaintiff had attended a public meeting during which a letter of the Community Superintendent setting forth the charges against him was read. The charges all related to plaintiff's competence to supervise a school.

The complaint also alleged that the plaintiff, a black, has been terminated for racial reasons.

A trial was held to review the circumstances surrounding the plaintiff's termination from his position of acting principal. At the conclusion of the trial, the District

Court found that the School Board was not racially motivated in terminating the plaintiff. The District Court also denied plaintiff's claim for a hearing, finding that his professional career had not been adversely affected by his termination.

The Court of Appeals affirmed that portion of the District Court opinion that found that the plaintiff had not been terminated for racially discriminatory reasons. It reversed the District Court's dismissal of plaintiff's claim for a pre-termination hearing, finding that the circumstances of his termination had sufficiently stigmatized him to require a hearing under Board of Regents v. Roth, 408 U.S. 564 (1972). The following question is presented:

Do published charges, all relating to a public employee's ability to perform his

job, impose on the public employee such a stigma or other disability requiring such employee to be given a due process hearing prior to his termination?

Statement of the Case

The plaintiff, Claude Huntley, a black, was assigned to the position of acting principal of New York City Intermediate School 33 (I.S.33) in Brooklyn, New York, effective September 9, 1970 (17a).* On May 24, 1973, the Community School Board voted in executive session to terminate the plaintiff's employment as acting principal of I.S.33 (64a). On May 25, the plaintiff filed a grievance with the Chancellor of the Board of Education alleging that his termination was illegal because it was taken at executive session rather than at a public

*Numbers in parentheses followed by "a" refer to pages of the Appellant's Appendix in the Court of Appeals.

meeting (64a). On May 30, the Chancellor upheld the grievance and found the plaintiff's termination to be illegal (64a).

On June 1, 1973, William Rogers, Community Superintendent, wrote a letter to the members of the School Board in which he described the plaintiff's deficiencies as an acting principal. The letter stated (12a):

"I am requesting the removal of Mr. Claude Huntley as Acting Principal of I.S. 33. Mr. Huntley has, over a protracted period of time, failed to demonstrate that quality of professional leadership necessary to effectively deal with the educational program at I.S. 33. Consequently, the school situation has rapidly deteriorated. Instances of his insufficiencies are as follows:

Mr. Huntley has not been able to implement an effective educational program. He has demonstrated an inability to provide the necessary leadership in working with a staff of professional teachers and supervisors. He has not provided for the basic safety

of the children and staff of the school. He has failed to maintain a reasonably functional educational plant that is conducive to an effective learning environment.

Mr. Huntley has not effectively resolved problems that occurred in the administration and supervision of the school. He has failed to anticipate problems and implement action that would provide a reasonable instructional atmosphere. He has not communicated as educational and administrative leader in a manner to provide a viable educational program.

Mr. Huntley has been ineffective in implementing recommendations and suggestions to improve the educational climate of the school. He has failed to utilize the additional resources that were provided to create an effective school program.

The leadership of Mr. Huntley at I.S. 33 has created a climate of confusion and discontent in the school. The educational climate of the school is now one of general disorder thus depriving many children of a proper and effective learning situation.

As the Community Superintendent, it is, therefore, my responsibility to recommend to the Community School Board of District 14 that Mr. Claude

Huntley be dismissed as Acting Principal of I.S. 33."

On June 5, 1973, the Community School Board held a public meeting (64a). At the meeting, the letter dated June 1, 1973, of William Rogers was made public (64a, 228a). Approximately 300 people attended the meeting (228a). At the conclusion of the meeting, the Community School Board voted to terminate the plaintiff (64a).

The plaintiff then commenced this action, pursuant to 42 U.S.C. §1983, alleging that his termination was racially motivated and that the termination violated his due process rights (65a).

The trial was commenced on February 6, 1975. During the trial the evidence showed that during the plaintiff's tenure as acting principal at I.S. 33, the school had too many fires, false alarms, teachers

failed to do their jobs and, in general, the school was out of control (72a, 481-482a, 483a 600-601a, 634a, 642a). It was disclosed at the trial that Mr. Huntley had been replaced by Leonard S. Pretty, a black. During Mr. Rogers tenure as community superintendent, thirteen members of minority groups were appointed to supervisory and administrative positions in the school district (34a, 694a).

At the conclusion of the trial, the Court, in an extensive opinion, dismissed the complaint. Concerning the charge of racial discrimination, the Court stated that it was "incumbent upon plaintiff to show that a white person in his position, with his qualifications and under the same conditions would have been retained" (A21-22).*

*Numbers preceded by "A" refer to pages of the Appendix annexed hereto.

After reviewing the evidence, the Court concluded that the School Board was not racially motivated in terminating plaintiff. It noted that discrimination was exercised in plaintiff's favor when he was initially appointed and then retained for almost three years (A41).

With respect to the due process claim, the Court stated that the plaintiff had to "establish by a preponderance of the evidence that failure to retain him constituted a slur against his good name, reputation, honor, or integrity" and in that event a hearing would be required (A21). The Court found that plaintiff had not sustained his burden, noting that "he has returned to the work he was doing before he was appointed to this position as Principal of I.S. 33" (A42).

The Court of Appeals, after reviewing

the facts, upheld the District Court's determination that the plaintiff was not terminated for racial reasons (A12).

The Court of Appeals reversed the District Court on the due process issue and found that the plaintiff was entitled to a hearing prior to his termination. The Court noted that the charges in the letter dated June 1, 1973, from Community Superintendent Rogers to the School board "go to the very heart of Huntley's professional competence" (A15). The Court concluded that Huntley's chances of obtaining a supervisory position have been impaired and that Huntley has been stigmatized "within the meaning of Board of Regents v. Roth, [408 U.S. 564 (1972)]" (A13,15).

REASONS FOR GRANTING THE WRIT

In Board of Regents v. Roth, 408 U.S. 564 (1972), this Court set forth the guide-

lines for determining when a public employee is entitled to a hearing prior to termination of his employment. In Roth this Court said that procedural due process applies only when the interest in continued employment is within the Fourteenth Amendment's protection of liberty and property and discussed each concept as it applied to public employment.

As to rights of liberty*, this Court noted that there might be cases where interests in liberty were "implicated" and, therefore, a statement of reasons and a hearing required. 408 U.S. at p.573. In noting that Mr. Roth's was not such a

*The Court of Appeals and the District Court found that the evidence did not support a claim by the plaintiff that he had a reasonable expectation of continued employment as a principal (A12, A42).

case, the Court stated (id.):

"The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge for example, that he had been guilty of dishonesty, or immorality. Had it done so this would have been a different case."

This Court then cited various cases, one involving the public designation of persons as excessive drinkers and the others involving imputations that persons were national security risks, where it had been held that due process required that hearings be given.

In the next paragraph of its opinion, this Court stated that a hearing might be required if the state imposed on Roth "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 408 U.S.

at p. 573. This Court then cited cases indicating what it meant by the term "stigma". The cases, which included a challenge to a statute limiting the percentage of aliens an employer many hire and two cases where petitioners had been denied admission to the bar, involved situations where the petitioners had been substantially foreclosed from all opportunities in their occupations.

That this Court's liberty test in Roth was intended to require a plaintiff to sustain a heavy burden of showing that his reputation has been tarnished or that he has been stigmatized is supported by this Court's decisions in Paul v. Davis,

____ U.S.____, 47 L. Ed. 2nd 405 (1976) and Bishop v. Wood, 44 U.S.L.W. 4820, June 8, 1976. In Paul, the plaintiff had been arrested for shoplifting and his name and

picture were included in a police flyer of active shoplifters. After the charge of shoplifting had been dismissed, the plaintiff sued for defamation, contending that the publication of the picture deprived him of liberty and his constitutional right of privacy. In dismissing the complaint, the Court reviewed the cases involving stigma and again pointed out that only where the stigma results in grave consequences with respect to some tangible interest, such as employment, will the liberty interest be sufficient to invoke the due process clause. 45 L. Ed. at pp. 414-416.

In Bishop v. Wood, the plaintiff, a policeman, was terminated without a hearing. The plaintiff had been informed by the City Manager that he was being terminated because of poor attendance, causing

low morale and conduct unsuited to a police officer. In holding that the plaintiff was not entitled to a hearing prior to termination, this Court stated that "the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." 44 U.S.L.W at pp. 4822-4823

In the instant case, the decision of the Court of Appeals to provide the procedural guarantees under the due process clause to the plaintiff is contrary to the decisions of this Court in Roth, Paul and Bishop. The Court of Appeals relied heavily on Mr. Roger's letter of June 1, 1973, recommending plaintiff's termination to support its conclusion that his professional career has been adversely affected (A14-15). The reasons set forth in the letter all relate to a failure by

plaintiff to meet the particular standards minimally required of a principal of an intermediate school as perceived by the Local School Board and the District Superintendent. These reasons, all relating to the plaintiff's competence for a job, are a different order of magnitude than charges such as dishonesty, or disloyalty which, as discussed in Roth, would entitle an employee to a pre-termination hearing. 408 U.S. at pp. 573-574. The decision of the Court of Appeals in the instant case to require a pre-termination hearing where the employee had been charged with incompetence, conflicts with the decisions of other Courts of Appeals. In Adams v. Walker, 492 F. 2d 1003, 1008 (7th Cir., 1974), the Court of Appeals held that the unelaborated charge of "incompetence in office, neglect of duty and malfeasance in

office" did not so stigmatize a public employee as to require a hearing before termination. See also, Brouillette v. Board of Directors of Merged Area IX, Etc., 519 F. 2d 126, 128 (8th Cir., 1975); La Borde v. Franklin Parish School Board, 510 F. 2d 590, 593 (5th Cir., 1975); Buhr v. Buffalo Public School District No. 38, 509 F. 2d 1196, 1199-1202 (8th Cir., 1974); Scheelhaase v. Woodbury Central Community School Dist., 488 F. 2d 237, 243-244 (8th Cir., 1973), cert. den. 417 U.S. 967 (1974); Shirck v. Thomas, 447 F. 2d 1025 (7th Cir., 1971), vacated 408 U.S. 940 (1973), on remand 486 F. 2d 691 (7th Cir., 1973).

Apart from the fact that the charges involved in the instant case do not seem to be of the magnitude contemplated by Roth, so as to require a hearing, the plaintiff here, despite a lengthy trial, never showed how

his career had been adversely affected by his termination. In fact his employment within his profession for the past two years rebuts any inference to the contrary. After the plaintiff was terminated from his position as acting principal, he returned to the work he had been doing prior to his appointment as acting principal (166a, 108a).

The decision of the Court of Appeals in the instant case, which stands for the proposition that the publication of job related reasons which may result in not being hired to do the same work requires the employee to be given a pre-termination hearing, represents an unwarranted departure from this Court's ruling in Board of Regents v. Roth, and is inconsistent with its later decision in Bishop v. Wood. As a consequence, this decision, which will affect

the administration of all governmental agencies throughout the country, is a decision, which warrants review by this Court.

CONCLUSION

A writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

June 30, 1976.

Respectfully submitted,
W. BERNARD RICHLAND,
Corporation Counsel,
of the City of New York,
Attorney for Petitioner.

L. KEVIN SHERIDAN,
LEONARD KOERNER,
of Counsel.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of June, one thousand nine hundred and seventy-six

Claude L. Huntley, Jr.,

Plaintiff-Appellant,

v.

Community School Board District 14 and William R. Rogers in his official capacity as Community Superintendent of District 14,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellees by notice of motion dated May 18, 1976 to stay issuance of the mandate pending application to the Supreme Court of the United States of America for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure
be and it hereby is granted

GRANTED

It is further ordered that

J. Edward Lumbard

Walter R. Mansfield

William H. Timbers
Circuit Judges

Al

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 53-September Term, 1975.

(Argued September 22, 1975 Decided May
12, 1976.)

Docket No. 75-7190

CLAUDE L. HUNTLEY, JR.,

Plaintiff-Appellant,
v.

COMMUNITY SCHOOL BOARD OF BROOKLYN, NEW
YORK SCHOOL DISTRICT NO. 14; WILLIAM A.
ROGERS, Superintendent of School District
No. 14; and JOSEPH M. BONOMO, PETER
DELLAICONO, LEROY O. FREDRICKS, BROTHER
ROBERT F. LALLY, RABBI LEOPOLD LEFKOWITZ,
RAYMOND MYGALSKI, LOUISE RIVERA and
THOMAS STROHMEYER, members of the
Community School Board of Brooklyn, New
York School District No. 14,

Defendants-Appellees.

Before:

LUMBARD, MANSFIELD and TIMBERS,

Circuit Judges.

Appeal from a judgment entered after

A2

a bench trial in the Eastern District of
New York, Jack B. Weinstein, District
Judge, which dismissed the complaint of
an acting public school principal in a
civil rights action brought against a
community school board, its members and
the district superintendent to challenge
the termination of his employment as hav-
ing violated his rights under the equal
protection and due process clauses of the
Fourteenth Amendment, the action having
sought declaratory relief, reinstatement
and damages.

Affirmed in part; reversed and re-
manded in part.

JAMES I. MEYERSON, New York, N.Y.
(Nathaniel R. Jones, Thomas
Hoffman, N.A.A.C.P., New York,
N.Y., on the brief), for Plain-
tiff-Appellant.

MARK D. LEFKOWITZ, Asst. Corp.
Counsel of the City of New York,

A3

New York, N.Y. (W. Bernard Richland, Corp. Counsel, L. Kevin Sheridan, Leonard Koerner and Deborah Rothman, Asst. Corp. Counsel, New York, N.Y., on the brief), for Defendants-Appellees.

TIMBERS, Circuit Judge:

On this appeal from a judgment entered February 19, 1975 after a three day bench trial in the Eastern District of New York, Jack B. Weinstein, District Judge, which dismissed the complaint of Claude L. Huntley, Jr., an acting public school principal, in a civil rights action brought against a community school board, its members and the district superintendent to challenge the termination of the principal's employment, the question presented is the correctness of the district court's rejection of Huntley's claims that his termination violated his

Community Bd

rights under the equal protection and due process clauses of the Fourteenth Amendment.

For the reasons below, we affirm the district court's rejection of Huntley's equal protection claim since there was not a scintilla of evidence that he was terminated for racial reasons; but we reverse the district court's rejection of his due process claim which was based on the failure to accord him a hearing prior to his termination and, as to this claim, we remand for a determination of what damages, if any, Huntley can prove that he sustained.

I. FACTS

We shall summarize those facts necessary to an understanding of our rulings on

¹
the questions presented.

(A) Huntley's Appointment

Huntley, a black, became acting principle of Intermediate School 33 (I.S. 33) in Brooklyn on September 9, 1970. He served until he was terminated on May 25, 1973. The school is located in New York City School District 14. The position of acting principal carried neither tenure nor any contractual right to continued employment under New York law. I.S. 33

¹

Our summary of the facts is based on the district court's findings of fact which we accept not only as not clearly erroneous, Fed. R. Civ. P. 52(a), but as a balanced evaluation of the evidence adduced at the three day hearing, consisting of the testimony of seventeen witnesses and fifty-three exhibits.

The district court's findings of fact provide the underpinning for its conclusions of law. We agree with one, as to the equal protection claim; but we disagree with the other, as to the due process claim.

A6

is approximately 99 per cent black and Hispanic. Approximately 90 per cent of the children who attend schools in District 14 are likewise black or Hispanic. The faculty at I.S. 33 is overwhelmingly white. Huntley was the first black principal in any of the schools within what is now District 14.

Both sides agree that Huntley was appointed pursuant to a so-called affirmative action program. He had significant credentials for the position. He had helped organize a public school for socially maladjusted boys in the same community. He had served in the same community as a teacher and as acting assistant principal for four and a half years before becoming acting principal of I.S. 33. By the time of the trial Huntley had completed the requirements for an M.A.

A7

degree from Columbia University Teachers College and had earned additional credits from that College and from Brooklyn college in Administration and Supervision. Although not certified as an intermediate school principal (such certification not being necessary for his I.S. 33 position), he was certified as an elementary or secondary school principal.

(B) Events Preceding Huntley's Termination

Despite Huntley's background and experience, shortly after he became acting principal, I.S. 33 became plagued with fires, hallway incidents, teacher complaints and other problems. During his three years as acting principal the school had 39 reported fires. The school had no reported fires the year before Huntley took over and only one the year after he was terminated.

A8

During his time as acting principal I.S. 33 also had an unusually high number of hallway incidents-caused by students and by outsiders-compared to the number of such incidents before and after Huntley's service. The number of parents who requested transfer of their children from I.S. 33 rose from 5 during Huntley's first year, to 28 during his second, to 132 during his final year. Thereafter the number of requested transfers dropped off significantly. During his service as acting principal a large number of teachers' grievances were filed against Huntley, most of which were upheld. On March 6, 1973, Huntley sent a letter to the parents of students apprising them of the "EMERGENCY SITUATION occurring in our school." The letter cited the large number of fires, false alarms, fights and

A9

disruptions, and asked for parent volunteers. The letter concluded with the warning, "You must act now because tomorrow may be too late."²

According to the witnesses who testified on behalf of Huntley at trial-including teachers, parents and a member of the school board-Huntley had developed a close rapport with students and parents, and had won community-wide approval. This testimony was sharply disputed by defendants' witnesses. Nevertheless, there was enough support for Huntley in the community so that when he was terminated the school

was boycotted and closed down for three days, and its graduation exercises were cancelled.

The evidence also disclosed that sharp differences developed between Huntley and the Superintendent of School District 14, William A. Rogers, about a year after Huntley became acting principal. By March 1973, they were exchanging heated letters over the large numbers of fires, teacher grievances and disruptions. The letters also dealt with Huntley's charges that the teachers had formed a "cabal TO GET HUNTLEY" and that they wanted to maintain "an institutionalization of racism" at the school. Huntley and Rogers also disagreed about educational philosophy. For example, they clashed over a social studies program in which leaders of a community gang were

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The emergency situation reflected in this letter is in sharp contrast with that indicated fourteen months earlier in his letter of January 11, 1972 to the Community Superintendent of District 14 in which Huntley asked for a salary increase and stated, "I.S. 33 is in better shape now than it has been throughout the history of the school."

invited to participate on an urban affairs panel together with members of the police department.

In his testimony at trial, Huntley attributed the large number of fires and disruptive incidents to insufficient staffing. Budget records, however, disclosed that I.S. 33 had been assigned twice as many school aid and school guard man-hours as any other intermediate or junior high school in the district. The school also had between six and eight assistant principals during Huntley's time as acting principal. This was as many as any other intermediate school in the district. Moreover, the number of fires and other incidents declined sharply under Huntley's successor, even though the number of school aid hours assigned to the school was cut nearly in half.

A12

Huntley also testified that the number of teacher complaints was attributable to racism. This was undermined by other evidence that Huntley's successor, also a black, was getting along well with the teachers and that only one grievance had been filed against him. Moreover, in a letter to the Chancellor of the New York City Public School System in 1972, Huntley asked for a salary increase and charged that he was being discriminated against in terms of pay because of his race. Previously he had been informed in a letter from the district superintendent that under the Board of Education regulations a higher salary could not be paid to him. When asked about this at trial Huntley admitted that he had looked at the regulations before making the charges of racial discrimination. Then he went on to ex-

A13

plain, "I was trying to get more money and I tried, but I didn't get it....I checked the regulation, but I felt that perhaps they could take my case under consideration...and maybe change the [regulation]."

(C) Huntley's Termination

On the evening of May 25, 1973 Huntley appeared before an executive session of the Community School Board to discuss his plans for reorganizing I.S.

33. Superintendent Rogers was present. Frictions between Huntley and Rogers by this time were at a peak. Huntley had been given no indication that the Board might discuss his performance as acting principal. Essentially the only discussion he had with the Board concerned his school reorganization plans. After Huntley returned home that evening, Leroy

Fredericks, one of the three minority members of the nine-member Board, called Huntley and gave him the surprising news that ³ the Board had voted to terminate him.

A Parents Association then filed a grievance on Huntley's behalf with the Chancellor of the New York City Public School System. The grievance asserted that the Board's vote was invalid because it was taken at an executive session rather than at a public meeting. Huntley was not entitled a hearing under New York law because he did not have tenure. The Chancellor nevertheless directed that the Board's May 25 vote be "ratified" at a public meeting. A special public meeting accordingly was called for June 5,

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Fredericks had voted against Huntley's termination. The other two minority members of the Board were not present at the meeting.

1973.

In the meantime Superintendent Rogers had sent to the Board members a letter dated June 1, 1973 setting forth formal charges against Huntley and recommending his termination. ⁴ Although Huntley had

4

Superintendent Rogers' letter of June 1, 1973 set forth the charges against Huntley as follows:

". . . Mr. Huntley has, over a protracted period of time, failed to demonstrate that quality of professional leadership necessary to effectively deal with the educational program at I.S. 33. Consequently, the school situation has rapidly deteriorated. Instances of his insufficiencies are as follows:

Mr. Huntley has not been able to implement an effective educational program. He has demonstrated an inability to provide the necessary leadership in working with a staff of professional teachers and supervisors. He has not provided for the basic safety of the children and staff of the school. He has failed to maintain a reasonably functional

(footnote continued on following page)

A16

not been given any written statement of the charges against him-prior to either the May 25 meeting or the June 5 meeting- Fredericks showed him his copy of Rogers' (footnote from previous page) educational plant that is conducive to an effective learning environment.

Mr. Huntley has not effectively resolved problems that occurred in the administration and supervision of the school. He has failed to anticipate problems and implement action that would provide a reasonable instructional atmosphere. He has not communicated as educationl and administrative leader in a manner to provide a viable educational program.

Mr. Huntley has been ineffective in implementing recommendations and suggestions to improve the educational climate of the school. He has failed to utilize the additional resources that were provided to create an effective school program.

The leadership of Mr. Huntley at I.S. 33 has created a climate of confusion and discontent in the school. The educational climate of the school is now one of general disorder thus depriving many children of a proper and effective learning situation."

A17

letter of June 1.

At the June 5 public meeting the secretary of the Board read Rogers' letter to the 300 or so persons present. Huntley was not given an opportunity to respond to the public reading of the charges against him nor to challenge them by calling witnesses. The purpose of the meeting was to "ratify" the Board's earlier vote, not to give Huntley a hearing.

The meeting turned into a bedlam. At the outset, the secretary of the Board announced that people in the audience would be allowed to speak for three minutes each-for a total of thirty minutes. When it was announced that the thirty minutes had expired and that no more speakers would be heard, Huntley's supporters, who comprised the majority of

the audience, turned the meeting into chaos. The police rushed in to break it up. The Board took a hurried poll. It resulted in a 7-2 vote to terminate Huntley. The two votes against Huntley's termination were cast by Fredericks and one of the other minority members of the Board. The vote was reaffirmed in a subsequent poll a short time later.

After the June 5 meeting parents and students staged a boycott of I.S. 33 with the results mentioned above-closing the school for several days and forcing cancellation of the graduation exercises. The Parents Association filed another grievance on Huntley's behalf. This was rejected by the Chancellor after a hearing.

Huntley commenced the instant action in the district court on November 30, 1973 seeking the relief stated above on the

ground that he had been terminated as acting school principal because of racial discrimination and without a hearing in violation of his rights under the equal protection and due process clauses of the Fourteenth Amendment.⁵ After a three day trial which began February 6, 1975, Judge Weinstein filed a comprehensive opinion on February 19, 1975 ordering that the complaint be dismissed. From the judgment entered the same day, this appeal was taken.

II. EQUAL PROTECTION CLAIM

We turn directly to Huntley's contention that the district court erred in rejecting his equal protection claim based on his assertion that he was terminated as

acting school principal for racial reasons. The predicate of his equal protection claim is that a history of racial discrimination in the New York City schools imposed upon defendants the burden of disproving a discriminatory motive for his termination.

The Supreme Court made it clear in its unanimous opinion in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), cited by appellants, that the burden of proving a nondiscriminatory reason for an employee's rejection shifts to the defendant employer only after the plaintiff employee has sustained the initial burden of establishing a *prima facie* case

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Although McDonnell dealt with questions of the order and nature of proof in actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (1970), by analogy the principles there enunciated are applicable here.

5 The action was brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. §§1981 and 1983 (1970), and its jurisdictional implementation, 28 U.S.C. §§1331(a) and 1343(3) and (4) (1970).

of racial discrimination.

Appellant also relies heavily upon Chance v. Board of Examiners, 458 F.2d 1167 (2 Cir. 1972), where we affirmed an injunction against the use of certain examinations for supervisory school positions which had a discriminatory effect. Our decision in Chance, which involved the conduct of entirely different persons than that involved in the instant case, most assuredly does not support the presumption of racial discrimination upon which Huntley relies.

Turning to the facts of the present case, it is true that Huntley was the first black school principal in an overwhelmingly minority school district. Beyond that, however, the record is replete with undisputed evidence to justify his termination for reasons having nothing to

do with racial discrimination. The fires, disturbances and general chaos at I.S. 33 were factors which the Board understandably and with reason took into consideration. Whatever the merits of the dispute, Huntley's educational philosophy and his views on the proper remedy for the school's chaos fundamentally were at odds with those of Superintendent Rogers. It is significant that Huntley was replaced with another black principal who is getting along with the teachers and is making headway at solving some of the problems facing the school, and is doing so with even less staff than Huntley had. Moreover, five of the Board members who voted to terminate Huntley had resisted attempts three years earlier to have Huntley's original appointment set aside in the state courts

7
as illegal. Beyond all this, Huntley's cavalier invocation of the slogan of racism in support of his salary demands, referred to above, surely casts doubt upon the good faith of his claim of racism.

We hold that, even on his own theory, Huntley failed to make out even a prima facie case of discriminatory motive which would shift the burden of justification to the Board. Moreover, the record fully

supports the district court's conclusion that he was not terminated for racial reasons.

We affirm the district court's rejection of Huntley's equal protection claim.

III. DUE PROCESS CLAIM

Huntley also contends that the district court erred in rejecting his due process claim based on the absence of a hearing prior to his termination.

His two-pronged argument in support of this claim is that he was entitled to a fair hearing on the charges against him because he had an expectation of continued employment and because the charges which were publicly announced impaired his chances of future employment. Although we hold the record does not support his claim that he had any reasonable expec-

7
Shortly after Huntley was appointed acting principal in 1970, the Council of Supervisory Associations of the Public Schools of New York City brought an Article 78 proceeding in the New York state courts to challenge Huntley's appointment under state regulations. The Board refused to withdraw Huntley's appointment in order to settle the litigation. Eventually the Board prevailed. Matter of Council of Supervisory Associations of the Public Schools of New York City v. Board of Education of the City of New York, 65 Misc. 2d 430, 318 N.Y.S. 2d 220 (Sup. Ct., Kings Co., 1971).

tation of continued employment as a school principal, we also hold that the circumstances of his termination cast sufficient doubt upon his professional competence as to impair the possibility of his obtaining future government employment.

As an acting school principal, Huntley did not have tenure under New York law. Nor did the Board's conduct or representations made to him justify a reasonable expectation that he would not be removed or that he would be terminated only for cause. Cf. Perry v. Sindermann, 408 U.S. 593, 599-603 (1972). As to this prong of his due process claim, therefore, we hold that he did not have any "property" interest in continued employment as an acting school principal. Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972).

We turn next to the other prong of

his due process claim, namely, that the likelihood of his obtaining future government employment in a supervisory position has been impaired because of the charges made against him and that his professional reputation has been damaged.

As Justice Jackson stated in his concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 185 (1953), referring to the discharge of government employees without a hearing:

"To be deprived not only of present government employment but of future opportunity for it certainty is no small injury when government so dominates the field of opportunity."

This observation by Justice Jackson was quoted with approval by the Supreme Court in its recent decision, Paul v. Davis, ___ U.S. ___, ___ (1976), 44 U.S.L.W.

4337, 4340 (U.S. March 23, 1976), as it was in its earlier decision, Board of Regents v. Roth, supra, 408 U.S. at 574.

Moreover, the charges forming the basis for discharging Huntley which were set forth in Superintendent Rogers' letter of June 1, 1973, supra note 4, and which were publicly read at the June 5 meeting, surely stigmatized Huntley within the meaning of Board of Regents v. Roth, supra. These charges included statements that Huntley "failed to demonstrate that quality of leadership necessary to effectively deal with the educational program"; that he was responsible for the rapid deterioration of the school; that he had "not provided for the basic safety of the children and staff"; and that his "leadership" has "created a climate of confusion and discontent". Having discharged Huntley

with a public statement of these charges, it is unlikely that Huntley would ever have a chance to obtain another supervisory position-in the public schools or elsewhere.

Our holding in this respect is not inconsistent with, but is supported by, Paul v. Davis, supra. There two county police chiefs had distributed to local merchants flyers listing the names and showing photographs of persons designated as "active shoplifters." The plaintiff, whose name and photograph appeared in the flyer, had been arrested on shoplifting charges but never convicted. He sued the police chiefs individually in a \$1983 action claiming that his reputation and opportunities for future employment had been damaged in violation of the due process clause. The Supreme Court held that

the plaintiff had not alleged a deprivation of "property" or "liberty" within the meaning of the Fourteenth Amendment, stating that "[W]e think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clauses of the Fifth or the Fourteenth Amendment." ___ U.S. at ___, 44 U.S.L.W. at 4340.

Here, unlike Davis, Huntley claims that the public statement of charges against him and the perpetuation of these charges in his record occurred "in the course of termination of employment," ___ U.S. at ___, U.S.L.W. at 4232, and that, as a direct result, he will be denied future employment. The charges set forth in Superintendent Rogers' letter of June 1

which was read publicly by the secretary of the Board go to the very heart of Huntley's professional competence. These charges have become part of Huntley's employment record and have been made a matter of public knowledge deliberately by Superintendent Rogers and the Board members. The Supreme Court in Davis again made it clear, as it had in Roth, that the protections of the Fourteenth Amendment are available whenever the state, in terminating an individual's employment, makes charges against him that will seriously impair his ability to take advantage of other employment opportunities. ___ U.S. at ___, 44 U.S.L.W. at 4340-42.

On the record before us, it is abundantly clear that Huntley's chances of obtaining a supervisory position in the public school system have been drastically

impaired. True, Huntley has been rehired as a teacher, but there is a significant difference between a teaching position and a supervisory position.

In the instant case Huntley's property interest in other employment opportunities was also impaired when the Board publicly announced its charges of incompetence without affording Huntley an opportunity to rebut them.

The thrust of the Supreme Court's decision in Davis was that not every defamation, merely because committed by a state official while abusing his powers, constitutes a violation of due process. The distinction in this respect between Davis and the instant case is critical. In Davis, state officers had exercised official powers in furtherance of their own designs for purposes clearly beyond

the scope of their official responsibilities. Here, by contrast, the hiring and firing of a school supervisor was the responsibility of the Community School Board under state law. The Board and the district superintendent were responsible for evaluating the supervisor's performance. They not merely have exercised official powers for improper purposes; they have abused state functions which they were charged with implementing. The nub of the distinction between Davis and the instant case is perhaps best pointed up by the Court's quotation in Davis from its earlier decision in Board of Regents v. Roth, supra, 408 U.S. at 573: "[T]here is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to

take advantage of other employment opportunities." ___ U.S. at ___, 44 U.S.L.W. at 4342.

That is precisely what did happen
8
here.

We hold that Huntley was entitled to a fair hearing prior to the Board's public

8 Although the Supreme Court stated in Davis that the "property" or "liberty" protected by the due process clause ordinarily must flow from a guaranty under state law or the Constitution, supra, ___ U.S. ___, at ___, 44 U.S.L.W. at 4339-43, the Court's reliance upon Screws v. United States, 325 U.S. 91 (1945), makes it clear that this need not always be the case. After noting that the Fourteenth Amendment prohibits "only state action of a 'particular character,'" the Court pointed out that the unlawful beatings involved in Screws were perpetrated by law officers "who made the assault in order to protect themselves and to keep the prisoner from escaping, i.e., to make an arrest effective." 325 U.S. at 110. The Court emphasized that "[The] officers of the state were performing official duties; [and] the power which they were authorized to exercise was misused."

announcement of charges which might impair his chances of future employment as a school supervisor and which might damage his professional reputation.

We reverse the district court's rejection of Huntley's due process claim.

In remanding for determination of appropriate relief in view of our holding on Huntley's due process claim, we leave this matter to the sound discretion of the district court, including what damages, if any, Huntley may be able to prove that he sustained.

No costs to any party on this appeal.

Affirmed in part; reversed and remanded in part.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
CLAUDE L. HUNTLEY, JR.,
Plaintiff,

-against
COMMUNITY SCHOOL BOARD OF
BROOKLYN, NEW YORK, DISTRICT NO.
14, and WILLIAM R. ROGERS in his
official capacity as Community
Superintendent of District No.
14.

Defendants.

-----x
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WEINSTEIN, U.S.D.J.

73 C 1775
MEMORANDUM
and
ORDER

Plaintiff seeks an order directing his reinstatement as principal of Intermediate School 33 in New York City's School District 14. He alleges that he was terminated arbitrarily, without a hearing, and because he was a black person, in violation of his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. Defendants, the Superintendent and members of the local Community School Board, contend that no hearing was granted because, as a non-tenured administrator, plaintiff was not entitled to one, and that termination was based solely on dissatisfaction with plaintiff's work, and was without racial motivation.

Even in the muted atmosphere of a federal courtroom, years after the events,

it is apparent that the circumstances surrounding plaintiff's dismissal involved heated emotions; conflicts among strong individuals with firmly held opposing views; turmoil as reflected in fires, boycotts, threats and counter-threats and charges of racial prejudice and academic plots; and fear for the welfare and safety of the students and faculty. But the task of this court is not one of assessing blame, of tracing disputes to their genesis, or of suggesting how forebearance and clearer judgment by those involved might have avoided this unfortunate denouement. It is, rather, to answer two narrow issues of fact and law. First, was the plaintiff entitled to a hearing? Second, did the Superintendent and the School Board act out of racial malice -- i.e., would a

white principal have been terminated under the circumstances the authorities then believed to exist?

The court is satisfied that the issues were well and fairly tried by able counsel on both sides. While there was considerable disagreement among witnesses for the plaintiff and for the defendants, in most cases the discrepancies were due to the difference in viewpoint in observing the original events, in attributing motives to the actors, and in recalling through memories colored by partisanship.

All those who testified seemed genuinely interested in the welfare of the children of I.S. 33, though they varied in their approaches. Those employed by the school system struck the court as competent professionals. The members of the School Board were dedicated laymen.

The members of the public were genuinely interested in improving education.

The Law

A. Right to a Hearing

Plaintiff was an acting principal. Although he held a certificate from the state, he did not hold one from the city. He had not achieved tenure and was, therefore, under New York law, not entitled to a full hearing before being discharged, as were tenured officials. In Birnbaum v. Trussell, 371 F. 2d 672, 677 (2d Cir. 1966) the court held "that public employees. . . have no absolute right to a hearing on discharge from public employment. . . ."

If, however, the termination ". . . permanently brands the person accused" id. at page 679, as a person with some moral lack rather than ordinary failure

to measure up to the needs of the job then a hearing is required. While the law does not confine the concept of immorality to sexual debauchery, alcoholic indiscretion, possible drug sales, disloyalty, or race prejudice (ibid.), there must be some predicate for social ostracism or obloquy; where termination is based upon failure of an employee to do his job properly a hearing for a non-tenured employee is not required. See, e.g., Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed.2d 515 (1971); Board of Regents v. Roth, 408 U.S. 564, 573, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972). As to the first cause of action, therefore, the plaintiff must establish by a preponderance of

the evidence that failure to retain him constituted a slur against his good name, reputation, honor, or integrity.

B. Racial Discrimination

In order to prove racial discrimination in a civil rights action, the plaintiff must show by a preponderance of the evidence that the discharge occurred because he was a member of a minority group.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 91 S.Ct. 1817 (1973). The reason given must be a "pretext" for racial discrimination. Ibid.; Watts v. Board of Curators, University of Missouri, 495 F. 2d 384, 389 (8th Cir. 1974). If the reason for discharge was in fact the Board's belief that the plaintiff was not competent to properly perform his duties as principal of I.S. 33, the plaintiff cannot obtain a favorable judgment. United

States v. Chesterfield County School Dist., S.C., 484 F.2d 701 (4th Cir. 1973); Cannady v. Person County Board of Education, 375 F. Supp. 1689 (M.D.N.C. 1974). It is incumbent upon plaintiff to show that a white person in his position, with his qualifications, and under the same conditions would have been retained.

The Facts

Obviously, racial problems were a factor in the dispute which gave rise to this litigation. The school, I.S. 33, is almost one hundred percent black and Hispanic. The district has a very large proportion of black and Hispanic students. The faculty at I.S. 33 is almost overwhelmingly white. Seven members of the local School Board are white, one is Hispanic and two are black persons.

At the time the plaintiff was ap-

pointed Acting Principal of I.S. 33, there were only two black supervisors in the district. His appointment was based upon an affirmative action program which resulted in his being brought in from outside the district in preference to others the then Superintendent thought more qualified. As part of this affirmative action program there are now fourteen black persons in supervisory capacities within this district -- including three principals.

The court takes judicial notice of the fact that there are racial tensions within the city and particularly within the schools. But not every dispute which has racial overtones involves a violation of constitutional rights. Whether the plaintiff has met his burden with respect to the two issues already described is

the matter to which we now turn.

The Witnesses

Claude L. Huntly, the plaintiff, is a distinguished-looking person. He comes from what appears to be a stable family, living in Roosevelt, Long Island, New York. His wife attended all sessions and was supportive and he described his stable family life. He has had extensive educational training at the graduate and post-graduate levels. He has also had a long and satisfactory career as a supervisor and teacher in a very difficult and demanding school for problem children. He has obviously given a great deal of thought to the problem of educating minority children and has fixed ideas on how that education should proceed. Generally, the court was impressed by him as a credible witness whose recollection of some of the events was col-

ored by the disappointment at having lost a position in which he took great pride.

He attributed difficulties in the school to a cabal of teachers out to get him, to lack of adequate assistance from the Board and Superintendent, and to the usual difficulties of educating ghetto children. He testified that he made many improvements in curriculum, including institution of special programs for more advanced and for troublesome pupils. In addition, he took what he considered were appropriate steps to check the inordinate numbers of fires that plagued the building and to check unruly behavior. It was his conclusion that the troubles were ending when he was fired and that had his plans for reorganization been adopted the school would have improved even further.

Plaintiff's second witness, Elizabeth

A46

Karpf, struck the court as being a competent and warm-hearted teacher and guidance counsellor. She has had forty years of experience in the school system and takes her responsibilities to the students quite seriously. She is obviously a strong defender of the plaintiff, she sat near his other supporters in the courtroom and reacted visibly to witnesses for and against him. Her conclusion that the plaintiff was a "good and kind administrator" is accepted as an honest opinion.

James H. Miller, plaintiff's third witness, also had wide experience as a teacher in the New York City school system. He was brought into I.S. 33 at the request of the plaintiff and was Acting Chairman of the Music Department. He has had extensive graduate and post-

A47

graduate educational training and strikes the court as a dedicated and honest witness. He also is a strong supporter of the plaintiff. He shares, apparently, the plaintiff's ideology in connection with teaching of minority students and believed that Mr. Huntley appreciably improved the school by, among other means, improving students' image of themselves. As he put it, previously the school had operated under a form of "benevolent paternalism" and as a "plantation". His view is taken at face value as indicating a strong belief that Mr. Huntley was an effective administrator.

The fourth witness, Leroy Fredericks, is a member of the District 14 School Board. One of his duties was to act as liaison between the Board and Intermediate

School 33. He is apparently a dedicated layman whose interest in education is based partly on the needs of his own family, but also on higher philosophical grounds that have induced him to attend Brooklyn College where he takes courses in education. While acknowledging substantial problems in the school while Mr. Huntley was a principal, his testimony may be summarized as supporting Mr. Huntley. He voted against termination.

The next witness for the plaintiff, Caroline Hupe, is a teacher at St. John The Evangelist, who worked with a group of parents interested in improving I.S. 33. She assisted in bringing Mr. Huntley's record to their attention. She appeared to be a sincere person dedicated to better education for minority

pupils. She obviously is a proponent of the plaintiff who believes that the plaintiff was doing a job that warranted his retention.

The next witness was Reverend Isaac Stokes, a minister from Bedford-Stuyvesant, whose children have attended and are attending I.S. 33. He struck the court as an honest witness, interested in the welfare of his children and, therefore, of the school they were attending. He was generally satisfied with Mr. Huntley's performance and thought that this was the community's evaluation. He thought that the main problem was the disciplining of teachers. It was his impression that Mr. Huntley had improved communication with the students and improved school environment. He did admit that at times "everything became chaos" and that dis-

cipline is better under the successor of the plaintiff. He attributed this improvement at least in part to the fact that the teachers had stopped "sabotaging the program."

The final witness for the plaintiff in his direct case was John Steel, a teacher of reading and English in the New York school system for twelve years who has had extensive post-graduate education and has received recognition as a poet and playwright. He also was a strong supporter of Mr. Huntley. He obviously shares the plaintiff's views on proper methods of educating minority children and of the relations between principal and children in the intermediate school. He emphasized that the plaintiff identified with the children by such means as telling them "right on" or placing his

"fist up in the air." He was favorably impressed by plaintiff's policy of keeping an open door policy for students, teachers and others. Like the plaintiff, he attributed a good deal of the difficulty to an attempt by the teachers to "get" Huntley. He and other plaintiff's witnesses thought that the plaintiff had taken appropriate and sound action to reduce fires and disruption by children in the halls and that the difficulties, to the extent that they existed at all at the time Mr. Huntley was terminated, were due in the main to lack of cooperation by the teachers and by the Superintendent.

John J. O'Connor, the Custodian, was the first of defendant's witnesses. He authenticated logs indicating thirty-nine reported fires in I.S. 33 during

the three years the plaintiff was principal compared to a total of thirteen in the five other junior high schools in the district; Defendants' Exhibit T. In the two years preceding and the one year following plaintiff's term no fires were reported in I.S. 33.

The next witness for the defendant was the present principal of I.S. 33, Leonard S. Pretty. He, like the plaintiff, is a black person. He appeared to be a responsible and dedicated educator with extensive post-graduate education and experience in administration and a strong and effective demeanor. He had worked in the Local School Board headquarters. He appeared to be supported by a number of the teachers from the school who visited the courtroom during the course of the proceedings and

appeared to have a good relationship with them. His pragmatism and good judgment was reflected on a number of occasions when he refused to be drawn into any adverse characterization of the plaintiff's term.

The suggestion on the cross-examination that Mr. Pretty was "passive" and amenable to the wishes of whites who controlled the school board seems untenable. Also unfounded was the suggestion on cross-examination of this witness and on direct examination of other witnesses that he was transferred into the principalship in order to avoid having a black in a policy-making position at school headquarters. The position of principal constituted a promotion with an increase in pay, more time off, and with a much greater policy-making function. Mr. Pretty is obviously a man

of distinction with a will of his own. He struck the court, as in the case of other witnesses, as credible. Under his tenure there have been very substantial decreases in grievances brought by teachers, in requests to transfer out of the school by teachers and students, and, apparently, in disruptive behavior within the school. Fires have practically been eliminated. The court credits his testimony that this change was accomplished without any proportionate increase in assistance from the Superintendent or School Board; the number of teachers and other aides is proportionately less now than it was under the prior principal, the plaintiff.

The next witness was William A. Rogers, the Superintendent of the School District 14. He, like the plaintiff, was only appointed in an "acting" capacity

since he also lacked certification for the position he took. He has had extensive experience in administration and education. He struck the court as a generally honest and capable professional who, like the plaintiff, had his memory somewhat colored by the need to justify his position.

In considering Mr. Roger's role it must be borne in mind that in his acting capacity he was himself subject to termination by the School Board and that he was under great pressure to show progress and to eliminate problems from the school district. The court credits his testimony that he gave more time to the supervision and guidance of the plaintiff than he did to all other principals in the school district combined and that he was constantly troubled by complaints from teachers that the plaintiff would not listen to their

grievances or treat them properly under the contract with United Federation of Teachers. He believed that there were an excessive number of fires and that the "tone of the school was poor during the plaintiff's principalship." His perception of the school, apparently honestly arrived at, was that the school was "out of control." He had discussed the problem with the School Board and with Mr. Fredericks on a number of occasions and had sought to give guidance to the principal. The court also credits his testimony that the request of teachers for transfer out of I.S. 33 were greater than for other schools in the district.

The next witness was Ralph T. Brande. He also was a distinguished teacher with extensive supervisory ex-

perience. He is now employed by District 22 as a Superintendent and was the Superintendent in District 14 until 1972. The court is impressed by this witness as being credible and honest, although it must take into account the fact that he did not recommend the original appointment of Mr. Huntley and must have felt some chagrin that the Board had rejected his nominee in favor of Mr. Huntley. Although he gave Mr. Huntley a satisfactory rating during his first year, he thought he "was not functioning well enough." He attributed this to lack of experience but indicated that had there been no improvement he would have considered an unsatisfactory rating probable. He believed that Mr. Huntley was a poor choice for the job, who had

been appointed as a result of community pressure for a black principal.

Thomas C. Strohmenger was the defendants' fourth witness. He had been a law student while he was a member of the Board and voted to hire Mr. Huntley. Despite an implied threat from a lawyer for the Association of Supervisors that he might be held in contempt of court and that this might interfere with his admission to the bar, he, like the rest of the Board, defended in court their right to retain Mr. Huntley. He testified that parents of children at I.S. 33 as well as teachers and Mr. Rogers had repeatedly complained of conditions at I.S. 33. He was particularly fearful that students might be hurt in the many fires and at reports that a group of students trapped by a locked door had to be released by

firemen. It was his impression that problems "snowballed" beginning in September of 1972 and that things were "out of control" by May so that "the only recourse" was to "terminate." The Board, he said, had given Mr. Huntley more assistance than any other principal received. He did not want to terminate Mr. Huntley and did so only as a last resort and with no racial considerations.

Brother Robert F. Lally, the President of the School Board, and himself an educator, testified that he had recommended Mr. Huntley because he thought him the most qualified applicant. There had, he said, been a gradual deterioration in I.S. 33 after the new principal took over. There were fires, attacks on teachers -- one reported he

felt safer in Viet Nam than in the school -- and "general chaos." Teachers and students were requesting transfers and the Superintendent warned him that something had to be done. One Board member visiting the school had been knocked against the wall by children and was fearful. His action in voting to terminate, he said, was based upon his conclusion that education at the school was not acceptable under Mr. Huntley, who was not capable of administering the school. The plaintiff, he testified, received the same treatment as a white person would have received under the circumstances. Those with tenure were granted hearings before discharge; those without tenure were not afforded a hearing.

Arthur Brodsky, President of the

I.S. 33 Local of the United Federation of Teachers also testified for the defendant. He, too, struck the court as a credible witness. He noted "chaotic conditions," with children running uncontrolled through the halls and little education going on in the building. The teachers complained of fear for their physical safety and absenteeism was at a high rate. Mr. Huntley told him that "he was at war with the teachers" and that the union contract "did not apply at 33." He stated that conditions were better before Mr. Huntley arrived and after he left, and that the teachers had no problem working with a black principal.

At the request of the plaintiff, two witnesses were called by the court since, reportedly, they feared to test-

A62

ify as witnesses for a party. Dorothy Straker, a black Assistant Principal, who had a good reputation as administrator of the I.S. 33 annex, found the plaintiff accessible and cooperative. Her opinion of the plaintiff was good although she denied knowledge of what went on at the main building.

Buenaventura Gibbs, a black Assistant Principal at I.S. 33 when the plaintiff was principal, described Mr. Huntley's curricular changes favorably. He did not think the school unsafe for teachers and thought Mr. Huntley had improved student morale.

David Feldmesser, an Assistant Principal at the annex confirmed the testimony of Dorothy Straker. He was the last witness called by the defendants.

A63

Perceptions of the Board

The issue before us is not whether Mr. Huntley was in fact a good administrator, but whether the Board's perceptions of him were honestly arrived at without racial prejudice.

There is no doubt that there were many more fires in I.S. 33 than in any other school in the district. The situation did constitute a continuing danger. There is some doubt as to whether they remained at a high rate in the month immediately preceding the firing of the plaintiff, but, apparently, there was a good deal of talk about unreported fires. The perception of the Superintendent, Mr. Rogers, that the fires were continuing must be accepted as honestly arrived at even if it may have been due to misinformation.

There was also excessive lack of discipline of the students and lack of control of them in the hallways and in other places. Whether this was continuing at the same rate in the month immediately preceding the dismissal is not clear. Again, the perception of Mr. Rogers must be accepted as accurate that these disruptions and lack of proper tone in educational work in the school were continuing.

The court must also credit the testimony of Mr. Rogers that the only reason he gave Mr. Huntley a satisfactory rating in 1971 was that he himself had only been supervising him for four months and he thought it was unfair to give any but a satisfactory rating although he felt that Mr. Huntley was not operating at a satisfactory professional level. He obviously shared the opinion of Brande, the prior

Supervisor, that Huntley was, as a principal, "pretty close to the bottom."

The situation faced by the ~~new~~ superintendent, Rogers, was briefly this. He himself was a new man on the job who believed he had to show results. The main problems in the School District, apart from those inherent problems attributable to lack of money, poor reading scores, racial problems, poverty and the like, were focused at I.S. 33. A disproportionate amount of his time was spent in supervising and meeting with Mr. Huntley, the plaintiff. There continued to be fires and lack of discipline which could at any time have resulted in serious injury or death and would have resulted in the possible destruction of his own career.

What is quite clear is that the relationship between Huntley and Rogers in the

spring of 1972 reached a point where there was considerable hostility between them. Instead of attempting to work out his problems with the superintendent and with the school teachers, the plaintiff reacted by alleging racial persecution.

He had done this on at least one prior occasion when he complained about the fact that he was being underpaid as a principal. In his letter of March 25, 1972 to the Chancellor, he alleged that he was "the first BLACK PRINCIPAL and only one in District 14. I'm being discriminated against" by being underpaid. Yet, he admitted on the stand, that the pay scale he was getting was the one appropriate for an Acting Principal and applied to all Acting Principals in the city, and that his claim of discrimination was designed only "to get more money." P.85.

In construing the evidence to determine the state of mind of members of the School Board and the Superintendent three contemporary documents, of the 53 introduced, are critical.

By letter dated March 3, 1973, the plaintiff directly challenged Community Superintendent William Rogers. See Defendants' Exhibit C. He attributed his difficulties to a "cabal" whose desire was "to GET HUNTLEY AT ALL COSTS." He threatened that the Superintendent would "be involved in a incessant struggle to be remembered in our district." He suggested that the Superintendent was "not fully qualified" for his position and accused the teachers of "not performing" causing black, Hispanic and other children to become "educationally mutilated" and threatened to "sweep the slate clean"

of the staff in order not to sacrifice the children "on the altar of racism." (Emphasis in original.) He indicated that his difficulties were "racially inspired" and accused the Superintendent of "recoiling at the thought of a BLACK challenging the establishment." He accused the Superintendent of having "educational political debts to pay" and that he would "wade in my own blood if necessary, to defend my position at I.S. #33." He concluded by writing "You having laid the gauntlet, then, I shall take it up as it is and establish my battle plans and strategy."

In addition, on March 6th the plaintiff issued a letter to all of the parents in the district informing them of an "EMERGENCY SITUATION" (Defendants' Exhibit A) and asking for volunteer parents to assist

in the school. Among the problems he listed were:

1. Too many false fire alarms.
2. Too many fires in various sections of our school.
3. Too many children roaming the halls.
4. Too many fights in school and after school, especially among girls.
5. Some teachers failing to do their jobs in the classrooms.
6. Too much disrespect for authority by the students.
7. Constant use of vile, obscene and profane language by the students.

The Superintendent responded to what he called the Principal's "challenge" with a letter dated March 20. Defendant's Exhibit O. He reviewed his conclusion that "a general level of disorder existed at the school," and that fires continued. He sum-

marized his attempts to assist with additional personnel and suggestions that Mr. Huntley "relax [his] inflexible attitude. . . before the situation became completely out of hand." The plaintiff's letter of March 3 was characterized as "an unprofessional attempt to shift the blame for the situation at your school from your shoulders to mine." Referring to the Principal's charges as a "diatribe," "hysterical," and "strident," the Superintendent indicated that I.S. 33 was "beset by a general state of chaos." The Superintendent rejected the charge that he was guilty of "racism" and "harassing . . . and threatening [plaintiff] because of the color of [his] skin."

Apparently there were boycotts and other actions taken by some parents in the district to support Mr. Huntley before and after he was fired. Children were ordered out of the school over the school's loudspeaker system.

In evaluating the situation it must be remembered that the hierarchical line was from the Local School Board to the Superintendent to the Principal. Under the circumstances, with such a clear-cut conflict and inability to cooperate, it was obvious that either the Superintendent or Mr. Huntley would have to leave. No viable system could function with this degree of animosity. It is apparent that the Superintendent rather than resign determined to recommend the firing of Mr. Huntley. This was not due to any racial animosity but due to an inability of the

two to cooperate on an educational policy. That the Superintendent can and could cooperate with black persons is indicated by the fact that, according to testimony, he has had no difficulty working with Mr. Huntley's successor, a black person, and with thirteen other supervisors in the district.

It is apparent, too, that the Local School Board was not animated by racial considerations in firing Mr. Huntley. He had originally been retained because he was a black man and because it was the policy of the Local School Board to increase the number of black supervisors in the district. He was replaced by a black person.

The court credits completely the testimony of members of the School Board who said that racial animus did not enter

into their decision and into their evaluation, but that Mr. Huntley was fired solely because he could not, in their opinion, carry the responsibilities of Principal in I.S. 33. Discrimination was exercised in favor of the plaintiff in his hiring and in his retention for almost three years.

Conclusion

Failure to retain the plaintiff does not suggest any moral failing on his part. He was fired because in the honest judgment of the Superintendent and the School Board he lacked professional capacity to solve the extremely difficult problems in I.S. 33. Plaintiff's continued professional career as a teacher and supervisor has not been adversely affected. He has returned to the work he was doing before

he was appointed to this position as Principal of I.S. 33. Under the law he was not entitled to a hearing before his services were terminated. The Board followed a policy of not granting hearings to non-tenured employees. This policy was properly followed in the case of the plaintiff.

The second claim must likewise be dismissed. There is no proof of racial discrimination against the plaintiff. This case is strikingly similar to the case of Albaum v. Carey, 282 F.Supp. 3 (E.D.N.Y. 1968). At page 5 the court wrote:

While the teacher has the same right as any other citizen . . . , his style may "raise grave doubts concerning his fitness for position." I Emerson, Haber & Dorsen, Political and Civil Rights in the United States, 918 (1967). Particularly during the probationary period, the academic community as well as the community at large is justified in observing him and evaluating his judgment as he responds to the pressures of the

moment. . . . It will be difficult to prove that plaintiff was denied tenure in a public school because he exercised his constitutional freedom as a citizen . . . and not because of myriad reasons of taste and personal predilections.

After a full trial the court was compelled to conclude:

Although he was a devoted, highly skilled, and imaginative teacher, he had difficulties in developing new programs and in carrying out school policies because of substantial and continuing disagreements with administrators and supervisors. Denial of tenure was caused by a desire on the part of . . . the school superintendent, to eliminate from the school system a nettlesome individual who created annoying administrative problems. . . . The superintendent was entitled . . . to decline to recommend tenure during [the] . . . probationary period in order to reduce the possibility of disension with administrators and supervisory personnel.

310 F. Supp. 594 at 596 (E.D.N.Y. 1970).

A76

The complaint is dismissed with costs and disbursements to the defendants.

So ORDERED.

Dated: Brooklyn, New York
February 19, 1975.

U. S. D. J.

A77

AUG 2 1976

IN THE

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975

No. 76-104

COMMUNITY SCHOOL BOARD OF BROOKLYN, NEW YORK DISTRICT No. 14, WILLIAM A. ROGERS in his official capacity as Community Superintendent of District No. 14, et al.,

Petitioners,

—against—

CLAUDE L. HUNTLEY, JR.,

Respondent.

BRIEF FOR RESPONDENT

In Response To

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Question Presented	1
Statement of the Case	2
Reasons for Denying the Writ	7
CONCLUSION	18
Certificate of Service	19

TABLE OF CASES

Adams v. Walker, 492 F.2d 1003 (7th Cir. 1974)	11n
Anti-Fascist Committee v. McGrath, 341 U.S. 123, 71 S. Ct. 624, 95 L.Ed. 817 (1951)	7
Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974)	17
Birnbaum v. Trussell, 371 F.2d 672 (2nd Cir. 1966)....	7, 17
Bishop v. Wood, 44 USLW 4820, June 10, 1976	9, 9n, 12
Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)	7n, 9, 9n, 11, 13
Boulware v. Battaglia, 327 F. Supp. 368 (D.C. Del. 1971)	16
Brouillette v. Board of Directors of Merged Area IX, etc., 519 F.2d 126 (8th Cir. 1975)	9n
Buggs v. City of Minneapolis, 358 F. Supp. 1340 (D.C. Minn. 1973)	7, 14
Buhr v. Buffalo Public School District # 38, 509 F. 2d 1196 (8th Cir. 1974)	10n
Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)	17

	PAGE
LaBorde v. Franklin Parish School Board, 510 F.2d 590 (5th Cir. 1975)	10n
McNeil v. Butz, 480 F.2d 314 (4th Cir. 1973)	14, 17
Meredith v. Allen County War Memorial Hospital Commission, 397 F.2d 33 (6th Cir. 1968)	8
Morris v. Board of Education of Laurel School Dis- trict, 401 F. Supp. 188 (D.C. Delaware 1975)	8
Paul v. Davis, — U.S. —, 96 S.Ct. —, 47 L.Ed.2d 405 (1976)	9, 9n, 11, 12, 13
Scheelhaase v. Woodbury Community School District, 488 F.2d 237 (8th Cir. 1973), <i>cert. denied</i> 417 U.S. 969, 94 S.Ct. 3173, 41 L.Ed.2d 1140 (1974)	11n
Shirck v. Thomas, 486 F.2d 691 (7th Cir. 1973).....	11n
Stretten v. Wadsworth Veterans Hospital, — F.2d — (9th Cir. May 18, 1976)	11n
Suarez v. Weaver, 484 F.2d 678 (7th Cir. 1973).....	17
Wellner v. Minnesota State Junior College Board, 487 F.2d 153 (8th Cir. 1973)	7
Whitney v. Board of Regents, 355 F. Supp. 321 (E.D. Wis. 1973)	7
Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L. Ed. 216 (1952)	16-17
Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507, 27 L.Ed.2d 515 (1971)	7n, 8, 12

IN THE

Supreme Court of the United States

October Term, 1975

No. 76-104

COMMUNITY SCHOOL BOARD OF BROOKLYN, NEW YORK DIS-
TRICT No. 14, WILLIAM A. ROGERS in his official capacity
as Community Superintendent of District No. 14, et al.,

Petitioners,

—against—

CLAUDE L. HUNTLEY, JR.,

Respondent.

BRIEF FOR RESPONDENT

In Response To

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent prays that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled cause on May 12, 1976, be denied since said judgment is consistent with the applicable decisions of this Court leaving no question of import to be further decided.

Question Presented

Whether the public disclosure of the reasons for the Respondent's discharge, as a public employee, under the circumstances and in view of the substance of the charges

leveled against him, as adduced at the evidentiary hearing herein, so injured the Respondent's interest in his good name, reputation, and his ability to secure future employment in a supervisory position as to entitle him to the due process guarantees of the Fourteenth Amendment to the United States Constitution.

Statement of the Case

In order to fully understand why the judgment of the Second Circuit in this matter is consistent with previous decisions of this Court and leaves no question of further import to be decided, it is imperative that a full and complete statement of the evidence be set forth since it is only in the context of a detailed factual analysis that the propriety of the judgment can be understood. In order to avoid any misunderstanding of the facts herein, as presented in the Petitioners' Statement of the Case, Respondent believes the following should be added.

The Respondent is a Black American citizen who possesses over twenty years of teaching and administrative experience, substantial portions of which were spent in the New York City School District. See: Transcript of trial proceedings at pages 3-4 as set forth in Appellant's Appendix in the Court of Appeals. See also: Exhibit 1 therein at pages 823-825. From July, 1970 through June 5, 1973, the Respondent was employed by the New York City School District as acting principal of Intermediate School #33 in Brooklyn, New York Community School District #14 which is an entity within and part of the larger New York City School District. See: Testimony at page 167 of Appellant's Appendix in the Court of Appeals.

He was the first person of his race to hold the position of principal in Community School District #14 or the schools which otherwise comprise Community School District #14, said District having just recently been created under the decentralization law of the State of New York. He was hired as principal because, among other reasons, he is a Black person and pursuant to an affirmative action effort undertaken by the Community School Board #14. See: Testimony at pages 601-605; 612 of Appellant's Appendix in the Court of Appeals. On June 5, 1973, just prior to the close of the 1972-1973 school year, the Respondent was fired from his job. He is presently employed by the New York City School District as a *teacher*, a position different in nature than the *supervisory* position which he held at a special school in the New York City School District, prior to assuming his position in District #14.

At the end of each of his first two years in his position as acting principal the Respondent received satisfactory ratings for the performance of his duties. See: Exhibit 2 at pages 825-828 of Appellant's Appendix in the Court of Appeals.

On May 25, 1973, only approximately one month prior to the close of the academic school year, the Respondent appeared before the Community School Board to discuss a proposed reorganization of Intermediate School #33 of which he was principal. At that meeting no mention whatsoever was made of his pending termination; and not one individual Board member questioned him about the alleged "misconduct" for which he would ostensibly be terminated. See: Testimony at pages 221-222 of Appellant's Appendix in the Court of Appeals. See also: Testimony at pages 338-340 of Appellant's Appendix in the Court of Appeals.

Immediately after he left the meeting at which he discussed the reorganization of his school, one of the Board members moved to fire the Respondent from his job. The motion was seconded over the objection of the lone minority Board member at the meeting who was the Board liaison, as well, to Intermediate School #33 and who had never, himself, been informed of the proposed action.

The minority member and Board liaison to Intermediate School #33 indicated that the Superintendent had not preferred formal charges against the Respondent, as was the normal procedure; and that the entire effort to fire the Respondent at that time was out of order.

Over his objection and after the foregoing transpired, a Community Board member asked Petitioner Rogers if he wanted to recommend the Respondent's termination; and Petitioner Rogers did so, orally, a procedure never before utilized to fire an employee.

Eventually, the Respondent was terminated at the executive session of the Board, with the lone minority member thereat refusing to vote for said termination. See: Testimony at pages 338-344 of the Appellant's Appendix in the Court below.

When the Respondent was notified of his termination, he appealed the action of the Community School Board, administratively, alleging that his termination, without a resolution at a public meeting, was illegal and void. His appeal was sustained; and the Chancellor of the New York City School District ordered the Community School Board *to vote* upon the termination at a public meeting (otherwise ratify the action, previously taken, by and through a resolution) rather than at a closed meeting as had been done. See: Testimony at pages 223-227 of Appellant's Appendix in the Court of Appeals.

Thereafter, on extremely short notice, the Community School Board scheduled a *special* public meeting for June 5, 1973, only approximately three weeks prior to the close of school and prior to the time when notifications and ratings are normally given. Petitioner Rogers formally submitted charges against the Respondent in the form of a letter (See Exhibit 1 at page 12 of the Appellant's Appendix in the Court of Appeals). The Respondent never received a copy of said charges and only found out about the same through a Board member, Leroy Fredericks, who had received a copy of the letter as a Board member and had advised Respondent Huntley of its contents.

At a specially held *public* meeting, the letter was read in its entirety. Hundreds of people were in attendance. Thereafter, a confused vote was taken; and, ostensibly, the Respondent was terminated with Mr. Fredericks voting against the same (See: Testimony of Respondent at pages 227-228 of Appellant's Appendix in the Court of Appeals. See also: Testimony of Caroline Hupe at pages 386-387 of Appellant's Appendix in the Court of Appeals.

As a consequence of this public spectacle, the Respondent was ridiculed and embarrassed; and was the victim of a public stigmatization (See: Testimony of Caroline Hupe, *supra*).

Interestingly and significantly, a non tenured, white, probationary teacher was terminated from his position early in the 1971-1972 academic year as a consequence of his failure to appear for his duties until substantially after the school year had commenced. The teacher, himself, was under the jurisdiction of the Respondent. He was given an option to resign rather than to be formally terminated; and, more significantly, it was determined, as a matter of policy by the Community School Board, that the

resolution of his termination was not to be published on the public agenda of the Community School Board meeting and that the agenda should simply read that the Community School Board consider a resolution for dismissal of a probationary teacher. Neither the actual resolution or the teacher's name were printed (See: Exhibit 34 in Record. See also: Testimony at pages 710-712; 723-726 of Appellant's Appendix in the Court of Appeals).

There can be no doubt that not only was the Respondent treated differently than a similarly situated white professional employed by the Petitioners but that the process utilized in terminating the Respondent was contrary to the procedure previously agreed upon by the Community School Board with respect to said similarly situated employee. The only conclusion that one can reasonably come to is that the process utilized by the Petitioners was designed to and had the actual effect of ridiculing and stigmatizing the Respondent. As such, the process, including but not limited to the public disclosure of pervasive damning and stigmatizing charges, was so morally and otherwise defective that it infringed upon both the Respondent's liberty¹ and property² interests in violation of his constitutional rights as guaranteed by the Due

¹ The liberty interest, of course, revolves around the stigmatization and ridicule which befell the Respondent as a consequence of the public display which he was subjected to through the afore-described process and the debilitating effect of the same on his ability to secure future employment in a supervisory capacity.

² The property interest is statutorily created pursuant to the Civil Rights Act of 1871 (42 U.S.C. §1981), which was jurisdictionally pled (See: Complaint at pages 6-7 of Appellant's Appendix in the Court of Appeals) and which guarantees Black Americans the same rights in property and penalty, punishment and pain relative thereto as white American citizens, something which was clearly not accorded the Respondent if he is compared to the white probationary employee who was differently treated under similar circumstances.

Process Clause of the Fourteenth Amendment to the United States Constitution, thereby calling ". . . into play the Roth and Constantineau³ requirements". See: *Buggs v. City of Minneapolis*, 358 F. Supp. 1340, 1343 (D. C. Minn. 1973).

Reasons for Denying the Writ

In *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168, 71 S. Ct. 624, 95 L. Ed. 817, 852 (1951), Justice Frankfurter, in an opinion in which he concurred in the holding of the majority of this Court, noted:

"[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."

Thereafter the Court, from which the judgment herein challenged emanates, held that, while "public employees . . . have no absolute right to a hearing on discharge from public employment . . .", nevertheless ". . . courts have become more inclined to consider the methods and procedures by which a dismissal is effected as it may bear upon reputation and the opportunity for employment thereafter"; and it concluded in that case ". . . that, in the circumstances surrounding Dr. Birnbaum's removal from office, more was involved than merely the loss of the privilege of public employment". See: *Birnbaum v. Trussell*, 371 F. 2d 672, 677 (2nd Cir. 1966). See also: *Whitney v. Board of Regents*, 355 F. Supp. 321 (E.D. Wis. 1973); *Wellner v. Minnesota State Junior College Board*, 487

³ See: *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971).

F. 2d 153 (8th Cir. 1973); *Meredith v. Allen County War Memorial Hospital Commission*, 397 F. 2d 33 (6th Cir. 1968); *Morris v. Board of Education of Laurel School District*, 401 F. Supp. 188, 210-211 (D.C. Delaware 1975).

Following this same vein, the majority of this Court held in *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 27 L. Ed. 2d 515, 519 (1971) that:

"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. 'Posting' under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. *This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.*" (Emphasis added).

In reaffirming its *Constantineau* principle and amplifying upon the same this Court more recently stated:

"*The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of this contract on a charge, for example, that he had been guilty of dishonesty or immorality. Had it done so, this would be a different case, for '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'* *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 501, 510,

27 L.Ed.2d 515; . . . [other citations omitted]." (Emphasis added).

Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 33 L. Ed. 2d 548, 558 (1972).

Most recently, this Court has further clarified its position in this respect, See: *Paul v. Davis*, — U.S. —, 96 S.Ct. —, 47 L. Ed. 2d 405 (1976); *Bishop v. Woods*, 44 USLW 4820, June 10, 1976; and, notwithstanding the Petitioners' assertion that the judgment of the Court below is inconsistent with these most recent clarifications concerning the right to constitutionally guaranteed due process, Respondent submits that the judgment below is wholly justified by these decisions and is clearly consistent therewith.⁴

⁴ In addition to the three decisions of this Court referred to by the Petitioners in support of their application herein (*Board of Regents v. Roth*, *supra*, *Paul v. Davis*, *supra*, and *Bishop v. Wood*, *supra*), they cite several Circuit Court decisions as well. It is submitted, however, that, as with this Court's decisions, the cited Circuit Court decisions are consistent in principle with the judgment of the Court below. To the extent that the Circuit Court decisions hold contrary to the judgment of the Court herein (as with the case of this Court's decisions), such is a consequence of the difference in factual circumstances between the cited cases and the instant litigation.

Thus, in *Brouillet v. Board of Directors of Merged Area IX, etc.*, 519 F. 2d 126, 127-128 (8th Cir. 1975), the Circuit Court of Appeals for the Eighth Circuit, citing *Board of Regents v. Roth*, *supra*, as precedent, noted:

" . . . that a teacher's interest in liberty is sufficiently affected to invoke the protections of procedural due process when the threatened termination is the result of a charge which will place a stigma upon him and impair his ability to obtain new employment. *Roth*, *supra*, 408 U.S. at 573, 92 S.Ct. 2701; *Buhr v. Buffalo Public Sch. Dist.*, 509 F.2d 1196, 1199 (8th Cir. 1974); see also *Freeman v. Gould*, Special Sch. Dist., 405 F.2d 1153, 1161-67 (8th Cir. 1969) (dissenting opinion).

It held, however, in the context of the developed evidence in that particular case that:

"The allegations of inadequacy against the plaintiff were relatively minor, (e.g., tardiness, inability to maintain order,

The Respondent herein claims, that, in the context of his termination from public employment, charges, which

etc.) and not, we believe, of the sort that would seriously impair his ability to obtain future employment. See Scheelhaase, *supra*, at 242. Moreover, the board declined to make them public. See Buhr, *supra*, at 1199. We find no deprivation of liberty here and conclude that plaintiff was not entitled to the protections of procedural due process guaranteed by the constitution." (Emphasis added).

Id. at page 128. See also: *LaBorde v. Franklin Parish School Board*, 510 F. 2d 590, 593 (5th Cir. 1975) where the Fifth Circuit Court of Appeals noted that:

"The superintendent stated that all of his actions and those by the board were taken with maximum circumspection to Mrs. LaBorde's rights of privacy. He communicated only to her and submitted his recommendations only to the board.

* * *

None of the charges were made public by school officials. The brief mention in the local paper that her contract had not been renewed did not impugn Mrs. LaBorde's good name, honor or integrity. Under Roth's standards, her 'liberty' claim was properly denied." (Emphasis added).

and *Buhr v. Buffalo Public School District* # 38, 509 F. 2d 1196, 1199 (8th Cir. 1974) where the Court therein held:

"We cannot accept this argument under the factual circumstances of this particular case. Clearly, nonrenewal standing alone does not constitute the deprivation of an interest in liberty. Roth, *supra*, 408 U.S. at 574 n. 13, 92 S.Ct. 2701; *Arnett v. Kennedy*, *supra* 416 U.S. at 157, 94 S.Ct. 1633; *Calvin v. Rupp*, 471 F.2d 1346 (8th Cir. 1973). On the other hand, where reasons for nonrenewal are announced publicly or are incorporated into a record made available to prospective employers, such reasons may indeed affect the dischargee's chances of securing another job. See *Wellner v. Minnesota State Junior College Board*, 487 F. 2d 153 (8th Cir. 1973); cf. *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 27 L.Ed. 2d 515 (1971). In the instant case, the reasons for nonrenewal were never publicized. Ms. Buhr was confidentially informed of the reasons only upon her request and then only at a closed meeting of the school board. The confidential nature of these charges was respected even during the trial court proceedings, and we note that Judge Benson made no explicit reference thereto in his summary judgment order and memorandum. See 364 F. Supp. at 1228 n. 1. We fail to discover any suggestion in the undisputed facts con-

were leveled at him as justification for his firing and which bore and continue to bear significantly on his reputation and ability to secure employment in a supervisory position similar to the one he held prior to his termination, were publicly disclosed without allowing him the opportunity, in advance, to have a hearing whereat he could respond to the same and defend himself.

In *Paul v. Davis, supra*, this Court noted that the interest sought to be protected therein was the individual's reputation, alone, and nothing more; and that the interest in reputation, alone, and without more, did not give rise to either a liberty or property interest safeguarded by the Due Process Clause of the Fourteenth Amendment.

This Court, citing *Board of Regents v. Roth, supra*, noted in *Paul v. Davis, supra*, that, in order to raise ones interest in reputation to a constitutionally protected liberty interest, the defamation to ones reputation "had to occur in the course of the termination of employment." 47 L.Ed.2d at page 419.

Having analyzed *Paul v. Davis, supra*, and other precedents of this Court, the Court below, citing from *Paul, supra*, and noting that this Court was itself citing from its earlier decision in *Board of Regents v. Roth, supra*, concluded that, in declining to re-employ the Respondent

tained in the record that the defendants prejudiced Ms. Buhr's ability to secure another teaching position." (Emphasis added).

Moreover, *Shirek v. Thomas*, 486 F. 2d 691, 693 (7th Cir. 1973), *Adams v. Walker*, 492 F. 2nd 1003 (7th Cir. 1974), *Scheelhaase v. Woodbury Community School District*, 488 F. 2d 237 (8th Cir. 1973), cert. denied, 417 U.S. 969, 94 S. Ct. 3173, 41 L. Ed. 2d 1140 (1974) and *Stretten v. Wadsworth Veterans Hospital*, — F. 2d — (9th Cir. May 18, 1976) are factually distinguishable from the instant case (thus differentiating between their judgments and the judgment of the Court below); while at the same time they are totally consistent in principle with the holding below.

herein, the Petitioners imposed upon him a stigma, through the public disclosure of the extensive charges leveled against him, which foreclosed him from taking advantage of other supervisory employment opportunities; and, that, accordingly, he should have been accorded a hearing, prior to the publication, in order to give him an opportunity to respond to said charges and otherwise defend himself.

Bishop v. Wood, supra, the other of this Court's most recent pronouncements in this area, clearly supports the same conclusion. In *Bishop v. Wood, supra*, a police officer was fired without a prior hearing respecting the charges leveled against him as justification for this termination.

This Court noted that, as a matter of fact, the charges were communicated to the employee in private and were not made public except through the litigation which followed and in which the due process claim by the employee was asserted. This Court wrote:

"In *Board of Regents v. Roth*, 408 U.S. 564, we recognized that the non retention of an untenured college teacher might make him somewhat less attractive to other employers, but nevertheless concluded that it would stretch the concept too far 'to suggest that a person is deprived of 'liberty' when he simply is not retained in one position but remains as free as before to seek another.' *Id.*, at 575. This same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge."

Continuing, this Court, noting its previous precedents in *Wisconsin v. Constantineau, supra*, and *Paul v. Davis, supra*, concluded:

"In this case the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private and also were stated in writing in answer to interrogatories after this litigation commenced. *Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honesty, or integrity' was thereby impaired.*" (Footnote omitted) (Emphasis added).

Thus, acknowledging these precedents and the principles enunciated therein, applying the same to the facts at hand, and doing nothing more or less than what is required by this Court's decisions, the Court below, from whose judgment the Petitioners seek review, held that the Petitioners, in publicly disclosing the reasons for the Respondents separation from his supervisory position at the time and in the manner done and in view of the charges leveled, "imposed upon [the Respondent] a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities", See: *Paul v. Davis*, 47 L.Ed.2d at page 419, citing *Board of Regents v. Roth, supra* at page 573, thus requiring that he be given a fair hearing prior to said publication in order to allow the Respondent to respond to the charges and otherwise defend himself.

The Court below, following the precedent of this Court, held that being publicly branded, among other things, as an "ineffective" and "uncommunicative" administrator and a principal who "has failed to maintain a reasonably functional educational plant that is conducive to an effective learning environment", at the time and in the manner he was, placed on the Respondent a badge of inferiority and incompetence which "drastically impaired" his ability to pursue a livelihood as a principal or other supervisor in

the New York City School District or elsewhere. It found the publicly disclosed charges against the Respondent so pervasive, damning, and stigmatizing to "call into play the Roth and Constantineau requirements." See: *Buggs v. City of Minneapolis, supra* at pages 1342-1343. See also: *McNeil v. Butz*, 480 F.2d 314 (4th Cir. 1973).

It is important to direct this Court's attention to the content of the letter of June 1, 1973 which was disclosed at a public meeting on June 5, 1973 (the content of the charges is set forth at pages 6-8 of the Petitioners' Brief).

Said letter, which requests the removal of the Respondent from his position as acting principal, is replete with references to Respondent's conduct in his official capacity. Respondent is accused, among other things, of failing "to effectively deal with the educational program at I.S. 33", failing "to implement an effective educational program", failing to provide "for the basic safety of the children and staff of the school", failing "to maintain a reasonably functional educational plant conducive to an effective learning environment", failing "to resolve problems that occurred in the administration and supervision of the school", failing "to anticipate problems and implement action that would provide a reasonable instructional atmosphere", and failing "to utilize the additional resources that were provided to create an effective school program".

The charges state that the Respondent did not communicate as an educational and administrative leader, did not provide a viable educational program, was ineffective in implementing recommendations and suggestions to improve the educational climate of the school, and demonstrated an inability to provide the necessary leadership in working with a staff of professional teachers and supervisors.

As a result, the charges state that the school situation has "rapidly deteriorated," the leadership of the Respondent "has created a climate of confusion and discontent in the school" and "the educational climate of the school is now one of general disorder thus depriving many children of a proper and effective learning situation."

It is hard to imagine charges that could be more devastating to a school administrator's career than those set forth in the letter written by Petitioner Rogers about the Respondent, and, in fact, read, at the time and in the manner it was, at a public meeting.

It is obvious that the impression conveyed by and through the public disclosure of the charges was that the Respondent had been personally responsible for a situation bordering on chaos and anarchy. It hardly can be argued that the Respondent has not been fatally stigmatized in the eyes of any future prospective employer who might view the letter as well as in the eyes of the hundreds of people who publicly heard the charges disclosed. Accordingly, the letter must be viewed as effectively foreclosing the Respondent from any potential supervisory job opportunity with the City School District or otherwise which he might seek.

Virtually every sentence in the letter, written by Petitioner Rogers about Respondent Huntley and publicly read at the time and in the manner it was, is spiked with damning statements which reflect negatively not only upon every aspect of the Respondent's duties and responsibilities, as a school principal, but as a person as well. Of particularly damaging content is the charge, as if fact, that the Respondent had engaged in conduct (whether negligently or intentionally) which endangered "the basic safety" of school children and the staff of the school.

The Respondent, in effect, was charged, as if fact, with criminal conduct. See: Reckless Endangerment, New York Public Law, §122.20; and Official Misconduct, New York Public Law §195.00. Surely such charges have permanently ruined any chance the Respondent might foreseeably have had to obtain another position as a principal. It is this sort of "arbitrary vilification" which the Fourteenth Amendment is designed to protect against. See: *Boulware v. Battaglia*, 327 F. Supp. 368 (D.C. Del. 1971).

Petitioners seem to assert, moreover, that, even if the Court below was correct in finding stigmatization, as a matter of fact, nevertheless it was in error in requiring a due process hearing, prior to the disclosure of the charges leveled against the Respondent, since the Respondent did not establish as a matter of fact that his career was adversely affected through the stigmatization attendant to the nature and manner of his termination. They point out that, in fact, the Respondent has been employed "within his profession" for the last two years and that such rebuts any inference of damage to the contrary. See: Petitioners Brief at pages 18-19.

Speaking to the latter point, the Court below observed, it is submitted correctly, that, while it is true that the Respondent is presently employed as a teacher within the New York City School District (as he has been employed therein for a substantial period of time prior to his assuming the acting principal's position from which he was fired), nevertheless there is a significant difference between a teaching position and a supervisory position.

That the Respondent is still free to pursue a teaching profession can be of little solace to this highly qualified and aspiring individual; and the Court below correctly rejected the same as a defense to the due process claim in accordance with the precedent of this Court. See: *Wie-*

man v. Updegraff, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952) where this Court took judicial notice of the career injury attendant to the stigma of "disloyalty" without finding the same, in fact. See also: *Suarez v. Weaver*, 484 F. 2d 678, 680 (7th Cir. 1973), citing *Updegraff, supra*, in this regard; *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Arnette v. Kennedy*, 416 U.S. 134, 157, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974).

Moreover and not insignificantly the evidence herein, rather than a supposition, establishes injury in fact. Since the Respondent's termination as principal of Intermediate School # 33 in Brooklyn, New York School District # 14, he sought, on three occasions, to obtain three similar positions; and on all three occasions he was rejected for the same (See: Paragraph 31 (a) in Plaintiff's Affidavit at page 816 of the Appellant's Appendix in the Court of Appeals). It must reasonably, though tragically, be concluded that, as a matter of fact, the Respondent herein has been and will continue to be foreclosed forever from pursuing his chosen profession and attaining his lot in life. That such is attributable to the less than "facially neutral" termination cannot be disputed; and as such the Respondent has acquired "the type of stigma . . . which *Roth* contemplated would deprive a discharged untenured employee of liberty." *McNeill v. Butz*, *supra* at page 320. See also: *Birnbaum v. Trussell*, *supra*.

As such, the Court below was clearly justified in holding as it did; and its failure to do so would have otherwise been in direct circumvention and violation of the precedents of this Court, including its most recent pronouncements in this regard.

CONCLUSION

In view of the foregoing, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

July 30, 1976.

Respectfully submitted,

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Certificate of Service

James I. Meyerson, one of the attorneys for the Respondent herein, certifies that on the 30th day of July, 1976, I did serve three (3) copies of the foregoing upon the attorneys for the Petitioners by mailing the same to them, postage prepaid, first class, as follows: Office of the Corporation Counsel, City of New York, Municipal Building—16th Floor, New York, New York 10007 ATTENTION: Leonard Koerner, Esq.

Respectfully submitted,

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